BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GERALD GROENIG, et. al., Appellants, v. YAKIMA CITY and COUNTY, DEPARTMENT OF ECOLOGY, et al., Respondents.	SHB NOS. 92-30 & 31 ORDER OF PARTIAL DISMISSAL-SEPA-LACK OF JURISDICTION.

The issue before this Board is whether it has jurisdiction over the SEPA issues raised by Appellants in their shorelines appeal to this Board where Appellants had already raised the same or similar SEPA issues in a separate zoning action appeal filed in the Yakima County Superior Court. After reviewing the record, the briefs, the affidavits, and oral arguments of the parties, the Board makes these

FINDINGS OF FACT

I

On or about March 16, 1990, Columbia Asphalt and Gravel, Inc. (hereinafter "Columbia") submitted an application for zoning variances and Substantial Development and Conditional Use shorelines permits to Yakima City and Yakima County (hereinafter "Yakima") for a proposed project.

II

March 12, 1992, the Yakima Director of Planning issued a SEPA

Mitigated Determination of Nonsignificance (MDNS) for the proposed project.

III

May 25, 1992, Yakima issued Findings, Conclusions, and Decision giving conditional approval of some portions of the proposed project under the Yakima zoning ordinance and its Shoreline Master Program and denying a portion thereof.

IV

On June 1, 1992, Yakima issued a shoreline substantial development and conditional use permit to Columbia which the Washington State Department of Ecology (DOE) approved with conditions on June 4, 1992 (See DOE Cerification of Request for Review, par. 2, of record herein).

V

On June 26, 1992, Appellants filed an application for a writ of certiorari in the Superior Court of Yakima County seeking review of the Yakima zoning decision and "The failure (of Yakima) to comply with State Environmental Policy Act, WAC 197-11 and the county of Yakima's SEPA ordinance". (Affidavit of Gerald L. Groenig in Support of Application for Writ of Certiorari, attached to Affidavit of Robert C. Rowley in response to the Board's "Order to Produce".)

VI

On July 1, 1992, Appellants filed their appeal of the Shoreline Substantial and Conditional Use Permits with the Shorelines Hearings

Board, alleging inconsistency with the Yakima Shoreline Master Program and 90.58 RCW (the Shoreline Management Act) and with 43.21C RCW (SEPA), WAC 197-11, and the Yakima SEPA ordinances.

VII

On July 21, 1992, DOE certified Appellants' appeal to the Shorelines Hearings Board, a Prehearing Conference with all parties represented was conducted by the Board on September 23, 1992, and the Board issued a Prehearing Order on October 29, 1992.

VIII

On October 29, 1992, Respondents filed a Motion for Partial Summary Judgment with the Board claiming that Appellants' SEPA claims should be barred because of Appellants' failure to exhaust their administrative remedies. The Board established due dates for Appellants' answer and Respondents' reply, if any.

IX

Appellants' Responding Brief in Opposition to Yakima County Summary Judgment Motion, filed with the Board on December 1, 1992, included a statement on page 1, that "The SHB needs to be aware that the permit activity below involved both zoning permit decisions (appealed together with attendant SEPA issues) to the Superior Court for Yakima County".

X

On December 16, 1992, the Board issued an Order to Produce which required the parties to inform the Board by affidavit of the date of

filing of the Writ of Certiorari with the Yakima Superior Court and allowed the filing of memoranda presenting reasons why the Board should or should not dismiss the SEPA issues from the Shorelines appeal.

XI

On December 30, 1992, Appellants' Affidavit and Memorandum in response to the Order to Produce were filed with the Board. The Affidavit established that Appellants filed their application for writ of certiorari with the Yakima Superior Court on June 26, 1992, and that the writ was issued on Friday, July 10, 1992.

XII

In summary, Appellants filed their applications for review of the SEPA issues to the jurisdiction of the Yakima Superior Court on June 26, 1992, and to the jurisdiction of this Board five days later on July 1, 1992, thus creating concurrent jurisdictions over the SEPA issues.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

I

Jurisdiction is "the authority, capacity, power, or right to act". Black's Law Dictionary, Revised Fourth Edition, citing Campbell v. City of Plymouth, 293 Mich. 84, 291 N.W. 231,232. "The term

'jurisdiction over the subject matter' means authority of a court to hear and determine the class of actions to which the one to be adjudicated belongs and authority to hear and determine a particular question which it assumes to determine." Optometric Ass'n v. County of Pierce, 73 Wn.2d 445, 447 (1968) (cites omitted). Conversely, a tribunal without jurisdiction has no authority to hear and determine the action. "An order is void when the court lacks jurisdiction of the ... subject matter." State v. Turner, 98 Wn.2d 731, 739 (1983) (cites omitted).

II

Whether a tribunal has this power or jurisdiction to act in a particular area of the law (the "class of action") is primarily assigned by statute, but then each individual action (the "particular question") is subject to other considerations of equal weight such as statutory time limitations for filing an action, DOE certification of shorelines appeals, or certain legal doctrines which have been enunciated by the courts. If any one jurisdictional requirement is violated, the forum does not have the authority to act except to determine whether or not it has jurisdiction and, if not, to dismiss the case or issue.

III

In this matter, there is no question that both the Superior Court and this Board have statutory jurisdiction to hear and decide SEPA issues pertaining to both zoning and the Shorelines Management Act.

The question here is whether the Court and the Board can both retain that jurisdiction in this particular matter.

IV

The Board "may *sua sponte* raise jurisdictional issue(s) (and) may, when it is satisfied that it does not have jurisdiction, dismiss the request for review" (WAC 461-08-075). Here, the Board did, "*sua sponte*", raise this SEPA jurisdictional issue after being informed by Appellants of their Yakima County Superior Court filing. This information, for whatever reasons entertained by the parties, was not made available to the Board at the time the appeal was filed with the Board or at the prehearing conference on September 23, 1992. If it had been, this jurisdictional issue could and would have been considered and decided immediately.

V

However, the issue of jurisdiction can be raised and decided at any time during the proceedings (Boeing Company v. Sierracin Corporation, 108 Wn.2d 38 (1987); In Re Saltis, 94 Wn.2d 889 (1980)), even though considerable time and expense have already been expended, perhaps needlessly, by the parties and by the Board on the SEPA issue. Here, it is not only the Board's legal duty to raise the jurisdictional issue but, as a practical matter, it is also necessary to safeguard against a later jurisdictional dismissal by a reviewing Court after even more time has been expended in reaching a Board decision on the SEPA issues.

VI

Mutual of Enumclaw v. Human Rights Commission, 39 Wn.App. 213 (1982) at p. 216, states the law where an issue or issues are filed concurrently in a Court and an Agency:

> *When the jurisdiction of two tribunals is invoked concerning the same subject or controversy, the tribunal first obtaining jurisdiction has the power to decide the controversy to the exclusion of the other. (emphasis added.)*

"The reason for the doctrine is that it tends to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process." Sherwin v. Arveson, 96 Wn.2d 77 (1980) at p. 80.

VII

Sherwin also establishes that the doctrine applies

> *... only when the cases involved are identical as to subject matter, parties, and relief (and) the identity is such that a final adjudication of the case by the court in which it first became pending would, as res judicata, be a bar to further proceedings in a court of concurrent jurisdiction.*

See also Yakima v. Fire Fighters, 117 Wn.2d 655 (1991) where the Court considered the jurisdiction for each of two related but not identical labor contract issues where both issues had been submitted concurrently to an agency (PERC) and to a superior court. The Court cited and then applied the Sherwin criteria to determine whether the agency or the superior court had jurisdiction even though the Court recognized that PERC is considered both by statute and case law to possess special expertise in the labor

contract area (just as this Board may be considered to have special expertise in SEPA issues).

VIII

The Board now applies these criteria to the instant matter where SEPA issues have been raised in concurrent appeals to the Yakima Superior Court and to the Shorelines Hearings Board.

IX

With regard to whether the SEPA issues are identical, Appellant argues that there is a difference because, in the Court case SEPA is invoked in the appeal of a zoning decision, while in the Board case it is invoked in the appeal of a shorelines decision.

However, the validity of a SEPA decision is not governed by the type of permit being challenged but by the requirements of 43.21C RCW (SEPA), WAC 197-11, and the local SEPA ordinance. Those requirements for proper processing, evaluation, deliberation, hearing, decision etc. are the same whether the permit being sought is a zoning permit, a shorelines permit, or some other type of land use permit.

X

When considering whether a permit or permits should be granted, the governmental body must consider the character of the project (not the type of permit(s) applied for) and must consider the total possible environmental and ecological impacts pertaining to all anticipated governmental approvals to the fullest when making its decision. WAC's 197-11-055(2)(a)(i)/060(3)(c)(i); Eastlake Com. Coun.

v. Roanoke Assoc., 82 Wn.2d 475 (1973). And, in doing so, it must consider areas outside its jurisdiction if the project may have an environmental effect on such an area. Save v. Bothell, 89 Wn.2d 862 (1978).

The irrelevance of the type of permit(s) under consideration when SEPA issues are concerned, is fully shown on page 492 of Eastlake:

> *It is no answer...that the (agency) is bound and limited in its (SEPA) considerations to the...provisions of the Seattle (zoning) code. SEPA requires an integration of environmental factors into the normal governmental decision making processes, so that the "presently unqualified environmental amenities and values will be given appropriate consideration in decision making..."*

XI

Furthermore, the SEPA issues recited by Appellants in the following paragraphs of their appeals to the Board (Request for Review) and to the Superior Court (Rowley/Groenig Affidavits) show the sameness/similarity of those issues in the two actions:

Board		Court
9C(p.7)	:	B.2(p.7)
9D(p.8)	:	B.10(p.10)
9F(1,2,3)(p.8)	:	B.4(a,b,c)(p.8)
9G(p.9)	:	B.4(d)(p.9)
9H(p.9)	:	B.5(p.9)

NOTE: The above is a partial representation of the identity of issues which sometimes vary only by differences in verbiage.

XII

We conclude that the SEPA issues are identical as to subject matter.

XIII

We conclude from the title pages of the two documents that the parties are identical.

XIV

We conclude that the remedy sought is identical: the relief sought by Appellants in both appeals is the invalidation of the MDNS issued by Yakima, which invalidation by either forum would result in the disapproval of the project or its delay pending remedial measures (which would then be subject to Appellants' review during their determination.)

XV

We conclude that the decisions of the Yakima Court would act as a bar to further proceedings by the Board with regard to the SEPA issue through either the doctrine of res judicata or collateral estoppel.

> *The doctrine of collateral estoppel precludes relitigation of issues once litigated between the parties, even though a different claim or cause of action is asserted (emphasis added).* McCarthy v. Social and Health Services, 110 Wn.2d 812 (1980) at p. 823.

XVI

The effect of the operation of collateral estoppel apparently has already developed in this matter. According to Appellants' cover letter dated December 29, 1992, the Yakima Superior Court has already denied a motion by Respondents seeking summary judgment and dismissal of Appellants' SEPA issues due to Appellants' alleged failure to exhaust their administrative remedies.

If the Court has already dismissed that motion, then the doctrine of collateral estoppel requires that the Board dismiss the Respondents' same administrative procedures motion filed with the Board (Finding of Fact VIII above) even though considerable time, effort, and expense have already been expended on that motion by the parties and by the Board.

This item in itself is a telling demonstration of the reason and necessity for the doctrines governing concurrent jurisdiction and collateral estoppel enunciated by Mutual of Enumclaw, Sherwin, and McCarthy, *supra*.

XVII

Appellants advance a number of arguments which, they allege, distinguish between the facts of Mutual of Enumclaw, *supra* and the present action(s). We are not persuaded. The doctrine stated in Enumclaw was not generated by that court to fit the facts of that particular case. Rather, the doctrine of collateral jurisdiction is general, governing any and all cases where the four tests stated under Sherwin, *supra*, are met.

XVIII

Appellant claims that the zoning and the shorelines issues established different statutory filing times and that "A prudent appellant would never run the risk of losing SEPA appeal issues by failing to file them at the time the first appeal is taken". The Board may agree but points out that the same appellant, being

aware of the doctrine of concurrent jurisdictions, would file first, if possible, in the preferred forum, if there is one.

XIX

The governing statutes and the facts herein indicate that such first filing with the Board was possible. RCW 90.58.180(1) requires that an appeal of the issuance of a shorelines permit must be filed with the Board within 30 days of the date of filing, that date being (for a conditional use permit) the date DOE transmitted its decision to the local government (RCW 90.58.140(6)). In this matter, the DOE filing date was June 4, 1992, 22 days before Appellants filed their application in the Superior Court on June 26, 1992, 22 days during which Appellants could have filed first with the Board instead of waiting until July 1, 1992.

XX

Appellants claim in their brief, but not in their affidavit, that they were not notified of the June 4 DOE approval until June 30. Even if this were acceptable evidence, we do not find any statutory requirement that DOE had any responsibility to notify Appellants at the time of issue. RCW 90.58.140(6) requires only that "The department shall notify in writing the local government and the applicant of the date of filing". If there is some other requirement for notification of Appellants, it has not been established by the record.

We conclude that, under the known facts, it was not legally necessary for Appellants to have filed first with the Court.

XXI

In their cover letter of December 29, 1992, Appellants urge that, if the Board is inclined to dismiss the SEPA issues, they should first be given the opportunity to nonsuit those issues in the Superior Court, implying, it appears, that the Board would then assume jurisdiction. Appellants misapprehend the effect of lack of jurisdiction. This Board does not lack jurisdiction over the SEPA issues just from the time of this decision. Rather, the Board never has had such jurisdiction since June 26 when Appellants filed with the Superior Court. Nor do we have the authority to permit the "restoration " of jurisdiction where we have never had it. As stated above, our only authority, on finding that we do not have jurisdiction, is to dismiss the SEPA issues.

XXII

Appellants also urge that SEPA issues relevant to zoning should be tried by the Court, and those relevent to shorelines issues should be tried by the Board. We have already discussed the totality of determination required of an agency regardless of the type of permit under consideration. Further than that, WAC 197-11-680(4) states that "...the statute (RCW 43.21C.075) contemplates a single lawsuit..."

XXIII

Professor Richard Settle, in his Legal and Policy Analysis of SEPA , Issue 3, 1992, is even more positive:

> *SEPA compliance is not subject to piecemeal, isolated adjudication but must be evaluated as an integrated element of government decision making. (Par. 20), (and), A major purpose of the 1983 amendments and 1984 rules was to preclude multiple SEPA and non-SEPA lawsuits challenging various procedural and substantive elements of a single agency action. Thus, the judicial review authorized by SEPA must, without exception, encompass all challenges of the government action and related environmental determinations. All SEPA claims and any non-SEPA claims pertaining to a government action must be asserted in a single lawsuit... (emphasis added).*

(Note that, in the above, governmental "action" is not the granting of whatever permit is under consideration, but is the approval of a specific activity (or project). WAC 197-11-704.)

XXIV

In summary, we conclude that Yakima had to consider the total SEPA issues including those pertaining to zoning or the shorelines permit, that an appeal of the SEPA issues cannot be fragmented between the Court and the Board, and, because the SEPA issues were filed and submitted to the jurisdiction of the Yakima Superior Court before they were filed and submitted to the jurisdiction of the Shorelines Hearings Board, the Board does not have and has not had jurisdiction to hear those (SEPA) issues.

XXV

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board makes the following

ORDER

THAT the SEPA issues appealed to the Board by Appellants in this matter are hereby DISMISSED, this dismissal being without prejudice or effect on the shorelines issues appealed to this Board.

Done this 12th day of March, 1993.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

ROBERT V. JENSEN, Attorney Member

BOBBI KREBS-McMULLEN, Member

MARK ERICKSON, Member By RVJ

TOM COWAN, Member by RVJ

JOHN H. BUCKWALTER, Presiding
Administrative Appeals Judge.

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GERALD GROENIG, et. al., Appellants, v. YAKIMA CITY and COUNTY, DEPARTMENT OF ECOLOGY, et al. Respondents.	SHB NOS. 92-30 & 31 ORDER TO SHOW CAUSE

WHEREAS, in Appellants' cover letter, dated December 29, 1993, to their Affidavit and Memorandum in response to the Board's Order to Produce, Appellants stated that: "At the status conference, I request on behalf of my clients that we also place on the agenda a discussion of the rules regarding ex parte contact. I believe that the opposing attorneys are taking improper liberties in that regard."; and,

WHEREAS, Appellants' allegations were not supported by affidavit or other basis and were, therefore, excluded from the telephonic argument/discussion of February 16, 1993; and,

WHEREAS, this Board cannot take lightly any implication of improper ex parte communications particularly as it might imply or claim improper conduct on the part of a member of the Board or its Presiding Officer;

Now, THEREFORE, it is ORDERED

THAT, by March 22, 1993, Appellants shall file with this Board and serve on the parties an affidavit, with, at their discretion, any supporting documentation, memorandum, or letter, showing cause why Appellants made the December 29, 1993, ex parte allegations noted above; and,

THAT, if Respondents wish to respond by affidavit or other document, such response shall be filed with the Board on or before April 5, 1993, following which date the Board will determine what, if any, action it will take.

Done this 19th day of March, 1993

JOHN H. BUCKWALTER
Administrative Appeals Judge
Presiding

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GERALD GROENIG et al., Appellants, v. CITY OF YAKIMA et al., Respondents.	SHB NO'S 92-30/31 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came on for hearing before the Shorelines Hearings Board on July 6, 7, 8, and 9, 1993. The first day's hearing, which included a site visit, was held in Yakima, Washington, and on the other three days in the Board's offices in Lacey, Washington. Board Chairman Harold S. Zimmerman, Attorney Member Robert Jensen, and Members Richard Kelley, Bobbi Krebs-McMullen, Robert Hughes, and Thomas Cowan were in attendance with Administrative Appeals Judge John H. Buckwalter presiding. Proceedings were recorded by Betty J. Koharski on July 6 and 8, by Kim L. Otis on July 7, and by Louise M. Becker on July 9, all three being certified Shorthand Reporters, with Gene Barker & Associates of Olympia, Washington. Proceedings were also taped, and those members of the Board who were absent from the hearings at any time subsequently reviewed the tapes for those periods of time.

At issue were Appellants' consolidated appeals of the Shoreline Substantial Development and Conditional Use gravel mining permits ("Permits") granted to Columbia Asphalt & Gravel, Inc. ("Columbia") by Yakima City and by Yakima County (collectively referred to as

"City/County" or individually as the "City" or the "County") and further conditioned by the Department of Ecology ("DOE").

Appearances for the parties were:

For Appellants: Attorneys Charles Flower and Richard Rowley.

For Respondents:

Scott Beyer, Attorney, for Columbia and Wachsmiths.

Raymond L. Paolella, Assistant City Attorney, for the City,

Terry Austin, Deputy Prosecuting Attorney, for the County,

Rebecca E. Todd, Assistant Attorney General, for DOE,

Witnesses testified, exhibits were examined and admitted, and written closing arguments and proposed Findings were filed with the Board on or before July 22, 1993. From these, the Board makes these

FINDINGS OF FACT

I

The site of the proposed Columbia development (hereinafter, the Site) is the westerly portion of Willow Lake which is one of a chain of three lakes: Myron Lake to the west, then Willow Lake, and Aspen Lake to the east. All three are artificial lakes which were formed by gravel mining by Washington State in or about 1972 for the construction of State Highway 12 (SR 12) which runs west to east and lies to the north of and approximately parallel with the three lakes.

The Site does not lie in the 100 year flood plain of either the Naches or Yakima River.

II

Overflow of water from Myron Lake is easterly by a drainage ditch which then divides with a portion of the water draining toward SR 12, through a culvert, and into the Naches River, and a portion draining into Willow Lake. The flow of water from Willow Lake into Aspen Lake is facilitated by a culvert between the two. The principal sources of Willow Lake's water are by ground water percolation from the south and west and from the nearby Union Ditch which meanders in the same general west-east direction as Willow Lake.

III

The parcel in which the Site is located has been mined intermittently since the 1960's or earlier. The owner Wachsmith leased the parcel to Triangle Sand & Gravel Company from 1965 to 1987 when the lease was transferred to Columbia. In 1989, Columbia received a revised surface mining permit from the Washington Department of Natural Resources, and more recently Columbia has purchased the Site property from the Wachsmiths by a real estate contract which has not yet been paid in full.

IV

Because of the previous mining activity over a period of many years and the resulting extensive alterations, the Site is not a natural or pristine environment at the present time. In its present

condition, the Site serves no public or private purpose.

V

After Columbia's application for the Shorelines Permits in 1990, an easterly portion of the Site, which had been totally in the County, was annexed by the City on or about June 1, 1991. Subsequently, the Permit application was processed and approved jointly by the City and County. Because the City did not yet have the annexed area included within a DOE approved amendment to its Master Program, the criteria of the County Shoreline Master Program was applied in accordance with WAC 173-19-044:

> *Until a new or amended program (of the government assuming jurisdiction) is approved by (DOE) any ruling on an application for a permit in the annexed shoreline area shall be based upon compliance with the preexisting master program adopted for the area.*

VI

The Site lies within a shoreline area which is designated by the County Master Program as "Urban", and uses of the property immediately south of the Site are predominantly light industrial. The Yakima County Shoreline Master Program (SMP), par. 15.04.020, provides that surface mining activities in Urban areas may be permitted by a Conditional Use Permit.

VII

Willow Lake, at present, has no public access to it. The surrounding shores are owned to the north by the State, to the west by Wachsmith/Columbia, and to the south and east by Appellant Groenig.

Groenig owns a development of a number of waterfront condominiums, apartments, and other buildings situated along the easterly City portion of Willow Lake, approximately one-half mile east of the Site, and on Aspen Lake to the east of Willow Lake. The only legal access to these two lakes is enjoyed by the residents and invited guests in the Groenig development areas which are enclosed on the landward sides by a security fence; there is no access for the general public. Groenig was aware of the mining operations in the western portion of the Lake when he purchased his property and developed it.

VIII

Since the development of the Groenig property in 1977, but not before, Willow Lake has been used by the residents and their guests for swimming, sailing, boating, and fishing. Before Columbia built the berm, fishermen and boaters could go to the west (Columbia) end of the Lake which was, however, shallow, approximately only 5' in depth.

IX

The project proposed in Columbia's 1990 permit application includes a dike (berm) across Willow Lake segregating Columbia's portion from the rest of the Lake, the dewatering of Columbia's portion of the Lake, gravel mining from the surface of the dewatered portion, cleaning, washing, and stockpiling the gravel, and the construction and operation of concrete and asphalt plants on the Site.

X

Prior to the granting of the Permits and without required permits, Columbia constructed a berm separating its western portion of

Willow Lake from the easterly portions and began to dewater its portion and to mine gravel therein. The berm is approximately 365' long, 40' to 80' wide, 6'-7' in depth, and was constructed of inert materials with no potential danger to the environment. Some lowering of the Willow Lake water level was observed at the time of the dewatering in December, 1991. The weather in 1991 was exceptionally dry with very little rainfall, one result of which was a low level in the nearby Naches River.

XI

In January, 1992, the City/County and DOE issued a joint Enforcement Order and Notice of Penalty to the Wachsmiths and Columbia, and the dewatering and mining operations ceased. The berm remained in place until, during the Board's four day hearing period, Groenig, without a permit of any kind, breached the berm by removing a portion of it, whereupon the Board issued a Stop Order to Groenig as did DOE and the City.

XII

On or about May 26, 1992, after the public notice and hearings required by law and having adopted Findings, Conclusions, and Decision, the City/County issued Columbia a Substantial Development Permit and a Conditional Use Permit which included twenty-one conditions. Subsequently, on or about June 30, 1992, as required by the SMA, DOE reviewed the Conditional Use Permit and approved it with the addition of one more condition: that a City/County approved reclamation plan must be submitted to DOE prior to reclamation

activities. The Permits have not yet become effective because of the filing of this appeal.

XIII

On July 1, 1992, Appellants filed a timely appeal with the Shorelines Hearings Board which requested review of both Shorelines issues and SEPA issues. On March 12, 1993, by an Order of record herein, the Board dismissed the SEPA issues but retained jurisdiction over the Shorelines issues.

XIV

Any Conclusion of Law which is deemed to be a Finding of Fact is incorporated herein as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

1.0

The Board has jurisdiction over the parties and the subject matter of this action. RCW 90.58.180(1). The Board's jurisdiction is limited by RCW 90.58.140(2)(b) to the determination of whether the permit and project in question are consistent with (1) the applicable master program (SMP) and (2) with the Shorelines Management Act (SMA). Posten v. Kitsap County et al., SHB No. 86-46 (1987).

2.0

Because this appeal is a challenge to the granting of shoreline permits, the Appellant bears the burden of proof that the project is inconsistent with the SMA and the Yakima County SMP. RCW 90.58.140(7).

3.0

The Prehearing Order-Modified issued by the Board on June 16, 1993, Paragraph II limited the legal issues as follows:

> *Unless a party or parties submits more specific and acceptable issues by June 25, 1993, testimony and exhibits shall (be) admitted only if relevant to whether the proposed project is consistent with Chapter 90.58 RCW and the Yakima City/County Shorelines Master Program(s), more specifically the criteria for substantial development permits (section 17.05) and for conditional use permits (section 18.04).*

Appellants' Response To Modified Hearing Order Dated June 16, 1993, restated their proposed shorelines issues as included in the Board's original Prehearing Order of October 28, 1993.

We first analyze Appellants' proposed issues and then the criteria of SMP Sections 17.05 and 18.04.

APPELLANTS' ISSUES

4.0

Appellants' issues are stated in summary form.

4.1

Issue 1. *That the City/County decision was invalid because the berm constructed by Columbia is on Groenig, not Columbia, property.*

This Board has consistently held that it has no jurisdiction to adjudicate ownership issues. DOE et al. v. Kitsap County et al., SHB No. 93; Plimpton v. King County et al., SHB 84-23. Our jurisdiction, as noted above, lies solely with issues within the SMP and SMA none of which pertain to land ownership. Accordingly, the proposed issue and evidence concerning ownership of the berm property were irrelevant.

4.2

Issue 2a. *That SMP Sections 17.00 and 18.00 were violated because a description of the berm and its specifications were not described in the applications or Permits.*

Columbia's Permit application was submitted in 1990, the berm was built in 1991 without permit authorization, was subjected to City/County/DOE stop order action early in 1992, and was subsequently approved with conditions by the City/County in 1992. The berm comes to us as a *de facto* construction which is subject to our de novo hearing, its unauthorized construction having already been resolved by prior stop order action and resolution.

4.3

Issue 2b. *That segregation of the Site will lower Lake acreage to below 20 acres and take it out of Shoreline jurisdiction.*

If that were so, then shoreline permits for the Site itself, which is well below 20 acres, would have been unnecessary. The Site remains a part of Willow Lake, even though temporarily segregated by the berm. There is no violation of SMP Appendix "A" nor of RCW 98.58.030.

4.4

Issue 2c. *That Site segregation will prohibit navigation in the Site area which formerly was open to navigation.*

This will be a temporary condition, but the mining operation will increase the present shallow depth up to thirty (30) feet (Condition 2 of the Permits). This will ultimately enhance navigation and fishing. Whatever inconsistencies with SMP Sections 13.02 and 11.01 and of RCW 90.58.020 may exist during mining operations, the long term enhancement will far outweigh such temporary conditions.

4.5

Issue 2d. *Whether the City can legally issue a permit without first requiring the filing of an application and the payment of a filing fee.*

The City properly accepted the prior application to the County along with the processing requirements of the County SMP. (See Finding of Fact V above). There was no violation of the SMA/SMP sections cited by Appellant in this issue.

4.6

Issue 2e. *That the partition of a lake will result in an interruption to the hydrological continuity which will affect the water flowing into Willow Lake.*

The weight of the evidence shows that that the source of Willow Lake's water is by percolation of water from the south and west and from the Union Ditch, with only a minimal amount coming from Mryon Lake via the Site lake area. We find no violation of the SMP and SMA sections cited by Appellants.

4.7

Issue 3. *The authorized use is neither shoreline dependent nor shoreline oriented.*

This statement fails to recognize SMP Section 18.00 which defines conditional uses as:

> *...those uses which may be permitted to locate in shorelines areas, but are usually seen as uses which either do not need...(or are not) suitable for siting in shorelines locations.*

Here, mining, which originally created these lakes, while not a shoreline dependent use, is permitted by the SMP when authorized by a Conditional Use Permit (SMP Section 5.04.020). We find no violations of the SMP/SMA sections cited by Appellants.

4.8

Issue 4. *That no applications were filed with the City and incomplete applications were filed with the County.*

We find no deficiencies in the County applications and, consequently, no City deficiencies. See 2d above.

4.9

Issue 5. We quote this proposed Issue verbatim: "*Can a shoreline permit authorize filling and dredging within the waters of the state be approved without requiring applications for the authority, without applying the development criteria of the SMMP, and without specifying the nature of the authority granted in the permit?*"

We find no specificity or merit in this proposed Issue.

4.10

Issue 6. *That the berm will result in the elimination and perpetual loss of fish and wildlife habitat by segregating spawning grounds from the bass population of Willow Lake with a reclamation plan which will not be conducive to future populations.*

We heard no evidence which would support Appellants' allegations. On the contrary, we heard evidence from Fisheries that, while there would be a minimal temporary impact, the deepening of the lake by the mining operation would enhance the fish population.

4.11

Issue 7. *That the City/County decision is inconsistent with other more restrictive land use plans and ordinances of the City and County (citing SMP Section 7.00).*

The Board has no jurisdiction to determine compliance with zoning codes or other land use requirements unless such requirements have been made part of the applicable master program. Posten v. Kitsap County, SHB 86-46. The purpose of SMP Section 7.00 is to give direction, where the approval of a project requires issuing of

multiple permits (e.g. shorelines and zoning), that the more restrictive requirements will determine approval or non-approval of the project while the granting/denial of each permit will depend upon its own requirements. The Section does not make zoning ordinances or other land use requirements part of the SMA or of a derivative SMA. The SMA is a "state statute of general application basically intended for the protection of the environment rather than the quality of construction, and,...to the extent of any conflict between the Seattle building code and SMA, the latter must govern." Ecology v. Pacesetter Constr., 89 Wn.2d 203,214 (1977). Any other interpretation would render the SMP nothing but an addendum to other land use ordinances. Shorelines permits are reviewed by this Board for SMA/SMP requirements; other permits will be reviewed for their applicable requirements by other appeal processes.

4.12

Issue 8. *That the project is inconsistent with SMP section 15.04 and chapters 3 and 4.*

These SMP requirements will be discussed in detail in subsequent paragraphs. Here, it suffices to say that we find no inconsistencies with those SMP sections.

4.13

Issue 9. *That the decision improperly assumed the existence of pre-existing development rights.*

Appellant claims that this project is a non-conforming use which cannot be reestablished because it has been discontinued for more than one year. This might carry weight if a substantial development permit

alone had been issued on the basis that the project was grand-fathered in because of the years of mining in the area before the SMA became effective.

Here, however, Columbia also sought and was granted a Conditional Use Permit which is required for a new project, not for a grandfathered, prior-use project. Whether the non-conforming question is of importance in the matter of a zoning decision is the Court's concern, not ours. As to shoreline requirement, the Nonconforming Use Permit makes the question of prior conformance or non-conformance moot.

4.14

Issue 10 raises *general questions of vagueness, ambiguity, inconsistency, etc. in the conditions imposed by the Permits.*

We find the proposed issue, as stated, to be too general and vague to merit or make possible any detailed analysis of its allegations.

4.15

In summary, we conclude that Appellants' proposed issues are either irrelevant or that Appellants have not met their burden of proving alleged inconsistencies with the SMA or the SMP.

COMPLIANCE WITH SMP, SECTION 17.05

5.0

SMP Section 17.00 with appropriate sub-sections covers fees and procedural requirements for substantial development permits.

Sub-section 17.05 provides that "The decision ... to approve, deny, or approve with conditions an application for a Substantial

Development Permit, shall include written findings and conclusions and be based on the following criteria...(a,b,c,d):". Each of the criteria is discussed below.

5.1

Sub-section 17.05(a) requires Compliance with applicable use regulations of the Master Program.

Because the proposed gravel mining will be from the dry surface of a dewatered pit as opposed to dredging material from under the surface of a body of water, the Board concludes that the City/County properly decided that the proposed project is not "Dredging" but is a "Mining" operation governed by the use regulations of SMP Section 15.04 Mining, the relevant sub-sections being -.020,- .061, and -.065, which will be discussed under section 6.0 *et seq* below.

5.2

Sub-section 17.05(b) requires Compliance with applicable development standards of the Master Program found in SMP Section 14.00.

Sub-sections of the Shoreline Development Standards in SMP Section 14.00 are directed to the construction of structures and are not applicable to the proposed gravel pit project.

5.3

Sub-section 17.05(c) requires Compliance with RCW 90.58.

This requirement is basic and will be discussed in section 8.0 *et seq* below.

5.4

Sub-section 17.05(d) requires consideration of Any other factors that clearly relate to the general public interest concerning the shorelines.

Such "other" issues/factors have already been discussed above or will be discussed below.

6.0

As required by SMP 15.04.020, Mining, Urban Environment (ref. par. 5.1 *supra*), the Conditional Use Permit issued for this mining project was subject to the following relevant subsections of SMP 15.04.060 General Regulations for Mining Activities.

6.1

SMP 15.04.061 requires that *No mining or quarry operations shall be permitted that will alter, cause to alter, impede or retard the flow or direction of flow of any stream or river.* Appellant also cites a related SMP section, 15.14.021 which provides that landfill (in this case, the berm) is permitted in Urban areas provided that *The landfill will not...restrict stream or water flow...*

Only a minimal portion of Willow Lake's water is provided by Myron Lake overflow via the gravel pit area; percolating waters from the southwest and the Union Ditch are the major sources. After weighing Appellants' and Respondents' evidence, the Board concludes that the temporary berm will only minimally restrict the flow of water into the easterly portion of Willow Lake and will not lower its water level to the detriment of the residents.

6.2

SMP 15.04.065 requires that *Applicants...shall submit a mining and reclamation plan to the Administrator describing the proposed site...A surface mining plan...insufficient for protection or restoration of the wetland environment shall cause denial of a Substantial Development Permit.*

Condition 1, as imposed on the permits by the City/County, requires that "Mining and reclamation shall comply with all surface

mining permits issued by the Department of Natural Resources." However, the Permits issued to Columbia by the City/County provide that the site reclamation plan requires the approvals only of the City of Yakima Director of Community and Economic Devilopment and the Yakima County Planning Director and DOE. The following review of relevant statutes indicates that such a limited approval of the reclamation plan is insufficient.

6.2.1

RCW Chapter 78.44-Surface Mining states the statutory requirements for surface mining. The relevant sections are as follows:

RCW 78.44.010, as amended 1993, recognizes the economic importance of and the environmental concerns raised by surface mining:

> *The legislature recognizes that the extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation. It is not possible to extract minerals without producing some environmental impacts. At the same time, comprehensive regulation of mining and thorough reclamation of mined lands is necessary to prevent or mitigate conditions that would be detrimental to the environment and to protect the general welfare, health, safety, and property rights of the citizens of the state... Therefore, the legislature finds that a balance between appropriate environmental regulation and the production and conservation of minerals is in the best interests of the state.*

6.2.2

Further statutory provisions of note are:

RCW 78.44.050, as amended 1993: *The department (of Natural Resources) shall have the exclusive authority to regulate surface mine reclamation...(except that)...this (statute) shall not alter or preempt any of the provisions of...shorelines management (chapter 90.58 RCW).* (Our emphasis).

New Section 11 of Washington Laws, 1993, Chapter 518: *Prior to the use of an inactive site, the reclamation plan must be brought up to current standards.*
New Section 12 of Washington Laws, 1993, Chapter 518: *The department (of Natural Resources) shall have the sole authority to approve reclamation plans.* (Our emphasis).

RCW 78.44.170: *Appeals from determinations made under this chapter shall be made under the...Administrative Procedures Act.*

6.2.3

In reading the SMA and Chapter 78.44 together, the Board concludes that DNR has sole authority for the initial approval of a reclamation plan; that, when associated with a shorelines project, upon appeal this Board has the jurisdiction to assure that a DNR approved plan does exist before the project is allowed to begin operations; and, that any shorelines issues which may be found in the plan, such as public access to state waters, are subject to our jurisdiction and decisions.

6.2.4

Accordingly, the Board concludes that further Conditions shall be imposed upon the Permits: (1) that no mining operations shall commence at the Site until DNR has approved a reclamation plan for the Site and (2) that, in order to restore boat access from the easterly portion of Willow Lake and to ensure optimum quantity and quality of the remaining surface waters, the reclamation plan shall include a provision that the berm shall be removed under supervision of a qualified engineer or geologist upon completion of mining operations on the Site.

6.3

We conclude that the Appellants have failed to meet their burden of proving that the project and Permits, as conditioned, are inconsistent with the requirements of SMP Section 17.05.

COMPLIANCE WITH SMP, SECTION 18.04

7.0

SMP Section 18.00, Conditional Uses, defines conditional uses:

> *Conditional uses are those uses which may be permitted to locate in shoreline areas, but are usually seen as uses which either do not need, or depending on the environment, considered not to be suitable for siting in shoreline locations. ...*

Because gravel mining does not ordinarily need or depend on a shoreline location and may not be suitable for such siting, SMP Section 15.04 (CL par. V above) properly requires a Conditional Use Permit for this proposed mining project. As found in SMP Section 18.04. the criteria for such a permit are:

7.1

SMP Section 18.04 a) requires *That the proposed use will be consistent with the policies of RCW 90.58.020.*

These policies will be discussed below in section 8.0.

7.2

b) SMP Section 18.04 b) requires *That the proposed use is consistent with the specific policies and their underlying element goals which pertain to the particular type of project as indicated in chapter 4. of the Master Program* (our emphasis). Policies are discussed under 7.2.1 and goals under 7.2.2.

7.2.1

SMP Chapter 4 states the policies which provide the basis for

the Master Program Regulations. The Mining section lists four policies the first of which is: *Sand, gravel, and minerals should be removed from only the least sensitive shorelines areas.*

Willow Lake is not a natural lake but was formed by the gravel mining performed by the state for a state purpose. This Board has already decided that non-natural shorelines present a different context for decision than does a pristine, natural shoreline. Wallingford v. Seattle, SHB No. 203 (1976). We conclude that the Site, as it now stands, is not a "sensitive" shoreline area and there is no inconsistency with the policy statement.

The other three policies concern licensing requirements of DNR or the "Departments of Game and Fisheries" as they were titled at the time of SMP preparation and revision and do not warrant discussion here.

7.2.2

The "underlying element goals" referred to in SMP Section 18.04 b) are found in SMP Chapter 3, Goals for Yakima County Shorelines. Those relevant to Mining are:

Economic Development: *Encourage activities...which will enhance the quality of life for its residence with minimum disruption of the environment.*

Conservation: *Assure preservation of unique, fragile, and scenic elements and encourage sound renewable and non-renewable natural resources.*

Restoration: *Provide...for restoration of blighted areas...to a natural and/or rehabilitated condition.*

We conclude that the ultimate restoration of the Site following

completion of mining operations will satisfy the above goals and change what is now a "blighted" area to one which can enhance the lives of, not just the Groenig development residents, but of the general public.

7.3

SMP Section 18.04 c) requires *That the proposed use will not interfere with the normal public use of public shorelines.*

We conclude that the proposed project cannot interfere with what does not now exist since at present there is no public use, not only at the Site, but on any portion of Willow Lake.

7.4

SMP Section 18.04 d) requires *That the proposed use of the site and design of the project will be compatible with other permitted uses within the area;* and,

SMP section 18.04 e): *That the proposed use will cause no unreasonable adverse effects to the shoreline environment designation in which it is located.*

The area around the Site is predominantly light industry and, since there has been gravel mining in the immediate area for many years, we conclude that this project will be compatible with other permitted uses and will not cause any unreasonable adverse effect in the area.

7.5

SMP Section 18.04 f) requires *That the public interest suffers no substantial detrimental effect.*

This criterion appears to be the principal basis for Appellant's

challenge to issuance of the permits: that the public (in this case only a limited portion thereof, the residents in the Groenig developments in the easterly portion of Willow Lake and of Aspen Lake), will, allegedly, suffer detrimental effect from the conditions discussed below.

7.5.1

That the water level in the Lake(s) will be lowered due to separation of the Site from the rest of Willow Lake by the berm.

This contention has already been rejected by the Board. Appellants' testimony, which was based for the most part on unsubstantiated opinion, did not meet their burden of proof when weighed against the expert testimony and the observations of Respondents' witnesses.

However, we do conclude, from the evidence, that removal of the berm, at the conclusion of mining, will enhance the water quality of Willow Lake.

7.5.2

The same observations and conclusions are reached with regard to a second concern of Appellants: a lowering of water quality in the Lake(s) due to the cleaning and washing operations of Columbia on the Site.

7.5.3

We conclude that the visual and noise effects caused by the proposed project will be minimal, if at all, on the Groenig development(s) which are approximately one-half mile east of the Site.

7.5.4

We conclude that neither the Groenig property residents nor the general public will suffer any substantial detrimental effect from the proposed project and that, on the contrary, they and the general public will benefit from the restoration of the Site following cessation of the mining operations.

7.5.5

Furthermore, these concerns will be subject to continuing controls and assurances as required by Permit Conditions:

Condition 13, Water Level Monitoring Plan, which provides for the cessation of operations by Columbia if the City/County determines at any time that there is, or may be, a significant reduction in the water level of Willow Lake.

Condition 4, Water Pollution Prevention, which prohibits the discharge of pollutants from any source, including settling ponds, into Willow Lake or any other surface body of water and requires compliance with DOE waste water discharge permits.

Condition 14, Water Quality Monitoring, the requirements of which are similar to Condition 13 with regard to monitoring water quality.

Condition 19, Noise Abatement, which defines acceptable noise levels; also, Condition 20, Hours of Operation, which limits operational hours during the weekdays and weekends.

Condition 1, Reclamation Plan, which will require enhancemement of visual effect by revegetation, enhancement of fish and wildlife

habitat, and which will, by statutory decree (78.44 RCW) and with DNR approval, include those other factors found in 78.44 RCW which the legislature and DNR deem necessary for the control and rehabilitation of the environment.

7.6

We conclude that Appellants have failed to meet their burden of proving that the project and Permits are inconsistent with the requirements of SMP Section 18.04, criteria for Conditional Uses, and, furthermore, that the enforcement of the Conditions imposed by the City/County, DOE, and this Board will provide adequate continuing protection of the shorelines, not only of Willow Lake, but of other nearby bodies of water.

SHORELINES MANAGEMENT ACT (90.58 RCW) REQUIREMENTS

8.0

We conclude that, except for the lack of public access, which is discussed in paragraph 8.2.5 below, Appellant has failed to prove any material inconsistencies with the requirements of the SMA, including those specified in their proposed Issues which were discussed above. On the contrary, we find certain elements of the Act which, along with the Surface Mining Act, 78.44 RCW, support the proposed project.

8.1

In RCW 90.58.020 the legislature enunciated state policy and use preferences for the shorelines of the state, including this portion:

> *It is the policy of the state to provide for the management of the shorelines of the state by planning for*

and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest.

The proposed project is, in view of its location and prior mining activities, a "reasonable and appropriate" use. And, while it will cause a limited, but temporary, reduction in the navigation of the Site's portion of the Lake, the reclamation which will follow will enhance the present non-existent public's use of and its interest in the resulting deeper lake.

8.2

The same policy section, after declaring that the interest of <u>all</u> the people shall be paramount, orders that for shorelines of state-wide significance, preference shall be given to uses in a prescribed order of preference. The SMP specifically applies these preferences to all the shorelines of Yakima County. SMP, chapter 3, Goal 3, p. 15. The preferences, in order,1 are:

8.2.1

Preference (1) *Recognize and protect the state-wide interest over local interest.*

The depth of the state-wide interest in mining is established in RCW 78.44.010 (cited in Conclusion 6.2.1 above) which leaves no doubt of the importance which the legislature attaches to mining as an "essential" activity for the economic well-being of the state and nation. We conclude that the state-wide interest in this project outweighs the interest of the Appellants.

8.2.2

Preference (2): *Preserve the natural character of the shoreline.*

The present unuseful and unattractive character of the Site does not merit preservation, while the subsequent reclamation will improve its character to the benefit of the general public.

8.2.3

Preference (3): *Result in the long term over the short term benefit.*

The long term benefit after reclamation, which will enhance the public's use of the Lake, outweighs any short term minimal loss of benefit which may occur during the mining operation.

8.2.4

Preference (4): *Protect the resources and ecology of the shoreline.*

We conclude that the Permits as conditioned by the City/County/DOE, a DNR approved reclamation plan, and the further Conditions imposed by this Board will achieve this objective.

8.2.5

Preference (5): *Increase public access to publicly owned areas of the shorelines.*

Preference (6): *Increase recreational opportunities for the public in the shoreline.*

As Appellant properly points out, the lake is a navigable body of water. Further, it was created by the State when gravel on the site was mined for the construction of the adjacent highway. Whatever the later pattern of ownership of the surrounding lands, the SMA and SMP

require that permitted uses be consistent with the public interest; specifically, they prefer interests which increase public access to the shorelines. RCW 90.58.020; SMP, chapter 3, Goal 3, p. 15; chapter 2, p. 15. The public has "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes..." Orion Corp. v. State of Washington,.109 Wn.2nd 621,641, 747 P.2nd 1062,1073 (1987) (quoting Wilbur v. Gallagher, 77 Wn. 2nd 306,316, 462 P.2nd 232,239 (1969), *cert. denied*, 400 U.S. 878 (1970).

The evidence revealed that this project is located along the Yakima Greenway, a major public greenbelt, which includes public access. This location makes this site desirable for increased public access to the public waters of Willow Lake. As we concluded above, gravel mining does not constitute a shoreline dependent use. Paragrah 7, *supra*. However, it may still come within the category of permitted uses and promote the public interest, if the project provides for public access where none existed before. Davis v. City of Winslow, SHB No. 114 (1974).

Therefore, we conclude that the permit is deficient and must be additionally conditioned to allow, at a minimum, access to the lake which will increase the public's opportunity for recreation in the shoreline, after the mining is completed.

8.2.6

We conclude that, with the addition of the above stated Condition, the proposed project will meet all seven of the use preference considerations of RCW 90.58.020.

8.3

We conclude that the project also satisfies the use regulation elements found in RCW 90.58.100, and we conclude that there are no material inconsistencies between the proposed project and the SMA, Chapter 90.58 RCW.

9.0

Having considered all of the issues discussed above in these Conclusions of Law, we conclude, in summary, that Appellants have not met their burden of proving any material inconsistencies between the requirements of the SMA/SMP and the project/Permits granted by the City/County.

Having reached that conclusion, the Board now addresses certain other matters germane to our review in this matter.

10.0

On June 21, 1993, the Superior Court of Yakima County entered an oral opinion in Appellants' appeal of the zoning and SEPA decisions made by the City/County. More than a week later, on June 29, 1993, just a week before the first day of the scheduled SHB hearing, Appellants filed a Motion Alternatively for Reversal/Remand/ Continuance based upon assertions in the supporting affidavit of Mr. Rowley that the Court had remanded the matter to the City/County on both the zoning and the SEPA issues.

10.1

After a hastily arranged telephone conference on July 1, 1993, the Board issued its denial of Appellants' Motion. Not only did we

agree with Appellants' statement in their supporting affidavit that "...it is perilous for an attorney to attempt to paraphrase the content of a judge's ruling until it has been reduced to writing...", but we were and are bound to act only upon such a reduction to writing by CR 54:

> *Judgment. A judgment is a final determination of the rights of the parties in the action... A judgment shall be in writing and signed by the judge...* (emphasis ours).

Appellants' Motion, asking us to act upon their interpretation of what the Court said, in the absence of a written judgment stating the Court's final determination, was premature and did not merit substantive consideration. We note further that the Motion was untimely filed in violation of CR's 6(a) and 6(d) and was, therefore, violative of due process requirements:

> CR 6(d): *A written motion...shall be served not later than 5 days before the time specified for the hearing...*
>
> CR 6(a): *...When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.*

10.2

Subsequently, after the first day of hearing on July 6, 1993, but out of the presence of Respondents, Appellants filed a Motion for 1. Order Striking Motion in Limine, 2. Order Clarifying Buckwalter Orders, 3. Renewing Dispositive Motion for Remand/Reversal.

This Motion with supporting affidavits of both Appellant attorneys, Mr. Rowley and Mr. Flower, was filed with no evidence of having been served on the Respondents, was never advanced by

Appellants during the remaining three days of hearing, and was not timely filed and/or served as required by CR 6 (see 10.1 above).

Because the motion was not timely filed and because process requirements were not satisfied due to lack of notice to Respondents who had no opportunity to respond, the Board will and does order these documents, the Motion and the accompanying affidavits, to be stricken from the record.

10.3

On July 14, 1993, Appellants filed with the Board copies of the transcript of the the Yakima Court's Oral Opinion. That Opinion is open to possible further consideration or reconsideration by the Court and does not constitute the final determination of the rights of the parties which must be stated in a signed judgment (CR 54). Only if we had received such a document would we have been able to determine now, if at all, our decision might be affected by its findings.

11.0

Any Finding of Fact which is deemed a Conclusion of Law is adopted as such. From these Conclusions of Law, the Board makes this

ORDER

THAT Appellants' Motion for Striking Motion in Limine, Order Clarifying Buckwalter Orders, and Renewing Dispositive Motion for Remand/Reversal, filed July 6, 1993, along with the supporting affidavits of Rowley and Flower, is stricken from the record herein;

THAT the Shorelines Permits are remanded to the City/County for the addition of the further Conditions that:

> **No mining operations shall commence at the Site until DNR has approved a reclamation plan for the Site, and,**
>
> **After termination of the mining operation at the Site, the berm between the Columbia property and the rest of Willow Lake shall be removed under the supervision of a qualified engineer or geologist.;**
>
> **To allow public access to the Lake(s) area by extension of the Greenway Foundation pathway, Respondents shall grant a fee interest in a 15-foot strip of land to the Yakima River Conservation Area (Greenway Foundation); and an exchange of fee interests with the Washington State Department of Fish and Wildlife in accordance with the terms defined in Conclusion of Law, Paragraph VII, pages 11 and 12 of Respondent's proposed Findings of Fact, Conclusions of Law, and Order, of record herein (copies attached hereto) and incorporated as part of this Order. The Board also strongly recommends that, following completion of the mining operations, public access to the waters of the Lakes for boating, fishing, swimming, etc. which has been lacking heretofore be provided by the City's construction of a canoe tip, dock, or similar access point on property acquired from Respondents by appropriate means as determined by the parties.**

THAT, with the addition of the above Conditions, the granting of the Substantial Development and Conditional Use Permits by the City/County is AFFIRMED.

DONE this 9th day of November, 1993.

SHORELINES HEARINGS BOARD:

ROBERT V. JENSEN, Chairman

RICHARD C. KELLEY, Member

BOBBI KREBS-MCMULLEN, Member

ROBERT HUGHES, Member

THOMAS COWAN, Member

NOTE: Mr. Harold S. Zimmerman, who participated in the hearings, has since retired and is, therefore, not a signatory.

a curtain (or curtains) is determined to be necessary, it shall not be removed until turbidity analysis indicates the conditions within the enclosure have approached equilibrium with the area outside the booms. The engineer's report, together with "as-built" drawings indicating the relocated and/or removed dike, shall be submitted to both the City and County Engineers for approval prior to commencement of any relocation or removal work, and prior to any operations pursuant to this Permit.

VII

The proposed substantial development and conditional use would be more consistent with the preferential use criteria of the SMA and YCSMP if the Permit made provision for public access after completion of mining and reclamation. A new condition in substantially the following form would be consistent with this criteria:

Upon completion of mining and reclamation at the property which is the subject of the Permit, Columbia and the Wachsmiths shall grant to the Yakima River Conservation Area (Greenway Foundation) a fee interest in a 15-foot strip of land in or about the northeast corner of the subject property. Such 15-foot strip shall begin at the Greenway Foundation pathway on the adjacent Department of Transportation right-of-way, and then continue in a generally southerly direction to the high water mark of Willow Lake. This grant of fee interest shall be subject to a reserved right of access over and under the strip of land for access, roadway purposes and utilities, in favor of Columbia, the Wachsmiths, and their successors and assigns. Such easement shall be appurtenant to the land owned by Columbia and the Wachsmiths and their successors and assigns. Columbia and the Wachsmiths shall also agree to an exchange of a fee interest in property along the west boundary of the subject property, on a square foot for square foot basis, for property owned by the Department of Fish and Wildlife, which property of Fish and Wildlife is adjacent and contiguous with the project site. Such property to be exchanged by Columbia and Wachsmiths shall be adjacent and contiguous to the common west boundary between the subject

property and the property owned by the Department of Fish and Wildlife, and shall be no wider than fifteen (15) feet in width. The obligation to grant this fee interest shall be appurtenant to the land owned by Columbia and the Wachsmiths, and their successors and assigns, which is the subject property. The obligation to grant these fee interests shall arise only upon completion of mining and reclamation at the subject property, and shall only arise if the Greenway Foundation has established a pathway within and along the Department of Transportation right-of-way which adjoins the subject property, no later than one year after the completion of mining and reclamation at the subject property. If the Greenway Foundation has not established the pathway described herein within such time period, the obligation to grant or exchange any fee interests shall cease and be of no force or effect.

VIII

The proposed substantial development has not otherwise been shown to be inconsistent with the YCSMP or the SMA.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these FINDINGS and CONCLUSIONS, the Court enters this ORDER:

The Shoreline Substantial Development and Conditional Use Permits issued by the City of Yakima and Yakima County to Columbia Asphalt & Gravel, Inc. are remanded to the City of Yakima and County of Yakima for the addition of a modification of Condition 11 in substantially the following form:

> The structural integrity of the existing dike shall be investigated by an independent, licensed professional engineer who is qualified by experience and education to analyze the physical and structural requirements of such a dike. The

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